

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MICHAEL FLEXMAN,

Defendant-Appellant.

UNPUBLISHED
September 3, 2009

No. 285439
Kent Circuit Court
LC No. 07-006937-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for two counts of second-degree criminal sexual conduct (CSC II), involving a person under 13 years of age. MCL 750.520c(1)(a). We affirm.

The victim, who was under 13 years of age at the time of trial, testified that defendant, who was her stepfather, engaged in escalating sexual contact with her during the beginning months of 2007. The contact included touching her buttocks, kissing her on the lips, kissing her with his tongue, and culminated in two incidents where defendant touched the victim's breasts. During one of those occasions, defendant also placed her hand on his penis. Additionally, the victim's mother later discovered the victim sitting on defendant's lap with her shirt raised. At trial, other-acts evidence was presented regarding defendant's sexual contact with his own daughter and with the young daughter of a former girlfriend.

Defendant argues on appeal that the evidence was insufficient to sustain his convictions. He asserts that he was only convicted because the prosecutor was permitted to introduce evidence of other similar instances of alleged sexual misconduct by defendant, and the victim's testimony would not have supported his convictions standing alone. We disagree.

When reviewing a claim of insufficient evidence, we examine whether the evidence, viewed in the light most favorable to the prosecution, would warrant a reasonable trier of fact in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* Additionally, we defer to the jury's role as, "the sole judge of the facts. It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the

weight and credibility to be given to their testimony.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

MCL 750.520c(1)(a) provides that a person is guilty of CSC II if the person engages in sexual contact with another person and that person is under 13 years of age. Sexual contact is defined as, “the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge (ii) To inflict humiliation (iii) Out of anger.” MCL 750.520a(q). MCL 750.520a(e) defines “intimate parts” as including, “the primary genital area, groin, inner thigh, buttock, or breast of a human being.”

The evidence is sufficient to establish all the required elements of MCL 750.520c(1)(a), beyond a reasonable doubt, when viewed in the light most favorable to the prosecution. The victim testified that she was under 13 years of age at the time the charged offenses occurred, and that defendant touched her breasts in an intentional manner on two occasions. The fact that defendant guided the victim's hand onto his penis, kissed her and told her that he loved her before the incidents of touching, and was subsequently caught by the victim's mother kissing the victim on his lap with her shirt lifted, can reasonably be construed to establish that defendant's actions in touching the victim's breasts were done for the purpose of sexual arousal or gratification, or had a sexual purpose. The victim's testimony alone was sufficient to support defendant's convictions, even without corroborating evidence. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998). Further, although the victim could not remember the exact date of each instance of sexual conduct by defendant, “the prosecutor is not required to prove the exact date of a sexual assault offense.” *People v Watson*, 245 Mich App 572, 588-589; 629 NW2d 411 (2001).

Furthermore, the other-acts evidence regarding defendant's alleged prior sexual conduct with other young girls was properly admitted pursuant to MCL 768.27a. *People v Smith*, 282 Mich App 191, 205; ___ NW2d ___ (2009). The trial court gave the jury a limiting instruction with respect to this evidence, and the jury is presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra